PARDON MY STAT(E)US: EXPLORING APPLICABILITY OF THE GUBERNATORIAL PARDON POWER TO CORPORATIONS

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I. INTRODUCTION

Elon Musk has declared himself the TechnoKing of Tesla.[1] He has publicly engaged, sparred with, and cajoled California Governor Gavin Newsom over tax and regulatory policy.[2] And, after acquiring controlling ownership of Twitter, now X, Musk has restored former President Donald Trump's account, citing the "people [as] hav[ing] spoken."[3] Musk's actions could be seen as the latest iteration of how business magnates see their participation in the highest levels of American civic life. These actions could also be seen as a precursor to his pursuit of elective office, following the likes of Mayor Michael Bloomberg and President Trump.[4]

Certainly, the participation of capitalists and other celebrities in American politics is far from a novel concept. Nontraditional elected executives can challenge long held norms and customs and force a rethinking of how we view certain executive powers. The gubernatorial pardon power presents one

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1. Tesla, Inc., Current Report (Form 8-K) (Mar. 15, 2021); Chris Isidore, *Elon Musk Is Now 'Technoking' of Tesla. Seriously*, CNN BUS. (Mar. 15, 2021, 6:34 PM), https://www.cnn.com/2021/03/15/investing/elon-musk-technoking-of-tesla/index.html.

2. Hope Sloop, *Smitten-Sounding Elon Musk Gushes About Moving Tesla HQ Back to California as Gov. Gavin Newsom Gazes at Him, Triggering Speculation Tycoon Was Lured Back to Golden State With Tax Cuts*, DAILYMAIL.COM (Mar. 13, 2023, 4:39 PM), https://www.dailymail.co.uk/news/article-11787055/Tesla-bringing-HQ-California-2-years-leaving.html.

3. Clare Duffy & Paul LeBlanc, *Elon Musk Restores Donald Trump's Twitter Account*, CNN BUS. (Nov. 20, 2022, 9:30 AM), https://www.cnn.com/2022/11/19/business/twitter-musk-trump-reinstate/index.html.

4. As a naturalized citizen, Musk would not be eligible to become President of the United States. U.S. CONST. art. II, § 1, cl. 5. However, no such prohibition exists in, *inter alia*, California or Texas.

such opportunity. Imagine a Governor Musk, conceivably of California or Texas, faced with prosecution of Tesla, Inc. for mass injury traceable to criminally culpable actions by Tesla and its executives. Would he pardon the corporation? Does the gubernatorial pardon power apply to corporate persons? What are the ramifications of applying pardon power principles in this way? Most, if not all, American states provide their respective chief executives with generally broad pardon powers. This could prove a powerful tool in preservation of corporate value, notwithstanding seemingly glaring legal and ethical issues.

This Article will begin with a focused survey of the gubernatorial pardon power provided in the four most populous American states: California, Texas, Florida, and New York.[5] This Article will continue by discussing the theoretical bases supporting applicability of the gubernatorial pardon power to corporations and other juridical persons, focusing on the acknowledged and generally accepted concept of criminal culpability, the at least tacit acknowledgement of the corporate pardon potential embedded in certain state laws, and the analogous acceptance of the posthumous pardon—removing the formerly sacrosanct acceptance requirement imposed on the party receiving the pardon. This Article will then analyze the potential impact and ripple effects of applying the gubernatorial pardon power to corporate criminal culpability and conclude by highlighting certain prophylactic mechanisms that might dissuade a state's chief executive from the temptation to utilize the pardon power to benefit a corporation in which the executive might have an economic interest.

II. THE GUBERNATORIAL PARDON POWER

The American legal system, like many around the world, recognizes the concept of pardon as one of five forms of clemency, along with amnesty, commutation, remission of fines, and reprieve.[6] In Texas, the concept of a full pardon is defined as "[a]n unconditional act of executive clemency by the [g]overnor which serves to release a person from the conditions of his or her

5. *US States by Population*, POPULATIONU.COM, https://www.populationu.com/gen/us-states-by-population (last visited Oct. 14, 2023).

6. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991).

sentence and from any disabilities imposed by law thereby."[7] The pardon power is generally considered one of a number of clemency measures at a governor's disposal. Black's Law Dictionary defines clemency as "[m]ercy or leniency," particularly as applied in the criminal justice context.[8] The American pardon power, like many areas of law, is most directly traced to its English heritage. However, the broader clemency concept can be traced to earlier civilizations.[9] In the Judeo-Christian ethic, Governor Pontius Pilate's actions in allowing the Jewish populace to choose between the release of Jesus or Barabbas is regarded as a well-known example of Roman clemency.[10]

Early English history presented the victim of wrongdoing as the person possessing the exclusive right to pardon.[11] However, the introduction of an English monarch carried with it the development of royal dispensation of mercy.[12] Royal pardons were considered devices of equity that mitigated unduly harsh results emanating from strict application of law.[13] This investment of the

7. 37 TEX. ADMIN. CODE § 141.111.

8. *Clemency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

9. Eric R. Johnson, Doe v. Nelson: *The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156, 166–67 n.101 (2005) ("King Hammurabi was the first to popularly codify all the laws that were the roots for sources of disputes. William Seagle, MEN OF LAW 23 (1947). He inscribed his laws on a pillar of black diorite in the common language and placed them in plain view of the public. *Id.* at 24, 28.").

10. *See Matthew* 27:15–18 (describing Pontius Pilate's pardon of Barabbas instead of Jesus Christ). The Roman Empire used pardons as one of many devices to manage the populace. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 16–17 (1989).

11. *See* 3 U.S. DEP'T OF JUST., ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 26–27 (1939).

12. *See* Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. POL'Y 43, 48 (1998) (footnotes omitted) ("The thirteenth-century English case of Katherine Passeavant illustrates dramatically the unique and critical role of the pardon in an imperfect system of criminal justice. The defendant, just four years old at the time of her "crime," opened a door, accidently pushing a younger child into a vessel of hot water. The child later died. Katherine was arrested and imprisoned in the St. Albans jail, charged with criminal homicide. In 1249, English law did not provide for an infancy defense, and exceptions were not made for acts committed without criminal intent. Guilty of murder under the law, four-year-old Katherine was sentenced to death. Katherine's father, anguished by his daughter's imprisonment and impending execution, but without recourse under the law, sought the only relief possible—a pardon. Katherine's father begged the King for a pardon, which was granted.").

13. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND BOOK IV: OF PUBLIC WRONGS, 255–56 (Ruth Paley ed., Oxford Univ. Press 2016) (1769) ("The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. . . . This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who

pardon power in the chief executive was transported to colonized America, with the king delegating pardon authority to governors appointed to the colonies.[14] The governors' amnesty was a temporary measure designed to grant relief pending the king's final judgement of the culpable party.[15] Despite signifying a stark departure from the monarchial form of government, the founders of the post-revolutionary United States deliberately empowered the federal chief executive with pardon power via the newly crafted Constitution.[16] This approach was adopted in varying degrees amongst the states.[17] These varying state constitutional approaches represented a lingering distrust of a unitary, executive wielding, unfettered clemency power.[18] Eventually, this distrust for a strong executive branch in state government subsided.[19] As states joined the Union, most adopted constitutions which placed the clemency power in their governors.[20] Today, all fifty states have some version of clemency

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has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment."). Blackstone is widely considered "the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999).

14. Paul J. Haase, Note, *"Oh My Darling Clemency": Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287, 1291 (2002).

15. W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 12–13 (1941).

16. United States v. Wilson, 32 U.S. 150, 160–61 (1833) ("The constitution gives to the president, in general terms, 'the power to grant reprieves and pardons for offences against the United States.' As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.").

17. 3 U.S. DEP'T OF JUST., *supra* note 11, at 88–90; MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 18 (2006) ("Every state constitution provides for an executive pardon authority.").

18. In the aftermath of the American revolution, states commenced installation of their respective constitutions, supplanting royal colonial charters and, *inter alia*, delineating the pardon power within their borders. 3 U.S. DEP'T OF JUST., *supra* note 11, at 88–89. Six states allowed their governors to execute clemency authority with the consent of an executive board, five states granted their governors unfettered pardon power, and one state delegated this power to the legislature. *Id.* at 89–91.

19. *Id.* at 89–90. The successful implementation of the federal constitution aided greatly in mitigating prior distrust. *See id.* at 89.

20. *Id.* at 88–90.

involving, if not solely delegating, this power to the governor. Although this Article focuses on California, Florida, New York, and Texas, these states largely reflect prevailing attitudes towards gubernatorial pardon powers.[21]

The governor of California is the state's chief executive[22] possessing, *inter alia* though not unfettered, the power to pardon.[23] While the legislature has the power to provide regulations curtailing the exercise of the gubernatorial pardon power, the original California constitutional convention evidences the perspective that the power has been intended as an executive function at its core.[24] The question of how far the legislature can go in limiting the governor's power has not been settled.[25] However, it does not appear a reasonable reading of the California Constitutional text to imply that legislative limits would be perfunctory.[26] In fact, the text appears to reflect just the opposite: a concern regarding the dangers of unfettered pardon power vested in the governor and the unchecked exercise of executive grace.[27] Remarkably, the governor is required to involve

21. For a discussion of the various state approaches to state pardon powers, see Katie R. Van Camp, Comment, *The Pardoning Power: Where Does Tradition End and Legal Regulation Begin?*, 83 MISS. L.J. 1271, 1285–86 (2014) (footnotes omitted) ("Each state has the prerogative to determine the scope of its power to pardon. The state can grant great discretion to its governor to vacate state judgments, deny the governor the pardon power and vest it in a board, or can limit the circumstances under which a pardon may be granted. . . . There are six models for the administration of the pardon power in the United States. These models include the following: (1) independent board appointed by governor; (2) governor sits on high board of officials; (3) governor, advisory board must agree; (4) governor, advisory board must be consulted; (5) governor, advisory board may be consulted; and (6) governor, non-statutory advisory system.").

22. CAL. CONST. art. V, § 1.

23. *See* CAL. CONST. art. V, § 8(a) ("Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment. The Governor shall report to the Legislature each reprieve, pardon, and commutation granted, stating the pertinent facts and the reasons for granting it.").

24. Way v. Superior Court, 74 Cal. App. 3d 165, 175–76 (1977) (citations omitted) ("The debates during California's Constitutional Convention of 1879 demonstrate, and have caused us to conclude, that the Governor's pardon power is exclusive." Following a proposed amendment giving legislature pardon power, "the amendment was defeated and all reference to the [l]egislature was omitted from the pardon provision, compelling the conclusion that the Governor's power to pardon is exclusive").

25. None of the reported cases directly address the issue. *See, e.g.*, Santos v. Brown, 189 Cal. Rptr. 3d 238 (Ct. App. 2015) (finding the constitutionality of a law enacted by California's legislature requiring notification of the governor's pardon to the prosecuting district attorney was not at issue).

26. *See* CAL. CONST. art. V, § 8(a); CAL. PENAL CODE § 4807 (2013); CAL. PENAL CODE § 4852.16 (2019).

27. *See* CAL. CONST. art. V, § 8(a).

the state supreme court in the process of pardoning persons with multiple felony convictions.[28] None of these prophylactic measures deny the core pardon power to the California governor as its chief executive.

Florida similarly vests pardon power in the governor but requires the exercise of that power be in coordination with members of the governor's cabinet.[29] The governor maintains ultimate authority and discretion to grant or deny clemency requests.[30] One contemporary example demonstrating the extent of the governor's pardon power involved posthumous pardons of four African American men accused and convicted of raping a white teenager in 1949.[31]

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28. *Id.* ("The Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.").

29. FLA. CONST. art. IV, § 8(a) ("Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the custodian of state records, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of two members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.").

30. Sullivan v. Askew, 348 So. 2d 312, 315–16 (Fla. 1977) ("Article II, Section 3, Florida Constitution, divides government into three separate and distinct branches of government and provides that '[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.' Holding that an attempt on the part of the Legislature to exercise any part of the pardoning power would be in conflict with the Constitution, this Court, in *Singleton v. State*, 38 Fla. 297, 21 So. 21 (1896), opined: ' . . . we are of the opinion that the pardoning power, after conviction, conferred by this section upon the board of pardons designated, is exclusive, and that the legislature cannot exercise such power. The constitution of Missouri vested the pardoning power in the governor, and it was decided in *State v. Sloss*, 25 Mo. 291, that such power belonged exclusively to the executive department, and could not be exercised by the legislature. The constitution of the United States confers upon the president the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, and Judge Story says (2 Const. § 1504) that "no law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases." It was held, in *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366, that the pardoning power conferred on the president was not subject to legislative control. . . .' [. . .] Responding in the negative to the question of whether the requirements of Chapter 120, Florida Statutes, the Administrative Procedure Act, apply to the constitutional power of the governor to extend executive clemency, this Court explicated: 'This Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government. Merely because the 1968 Constitution has given the Governor the initiative to institute certain acts of clemency and expanded the number of cabinet officers eligible to participate with him in the exercise of these powers, we see no reason to depart from our previous view that the Legislature may not intrude into this area of constitutional authorization.").

31. Corey L. Gordon, *Righting Wrongs Through Posthumous Pardons: Max Mason, the Duluth Lynchings, and Lessons for the Future*, 18 U. ST. THOMAS L.J. 87, 111–12 (2022).

New York is an American state with perhaps one of the longest standing established traditions of the gubernatorial pardon power. In fact, New York served as a point of reference for Alexander Hamilton in Federalist No. 69.[32] King George III granted initial pardon power in New York State to the then governor, mirroring the established monarchial power to be employed under the crown's authority.[33] The first New York State Constitution, drafted in the wake of the American Revolution, adopted this tradition and practice of mercy vested in the chief executive, continuing the previously established governor's pardon power.[34] As the New York Constitution was later amended, the gubernatorial pardon power survived many proposals to restrict or transfer, sometimes both, this power to judicial, legislative, or other representative authorities.[35] There were several proposed but unsuccessful restrictions, which included an attempt to grant the state senate final authority over pardons of murder convictions, a mandate that the governor deliver notice of his or her intent to pardon to the judge or district attorney that had tried the case, and a requirement that the governor notify the public concerning filed pardon petitions and hold a hearing to receive input from concerned stakeholders and give interested parties a chance to voice their views.[36] The 1867 Constitutional Convention involved the consideration and ultimate rejection of the concept of a pardon board as unduly inhibiting equitable considerations considered essential to the exercise of the governor's pardon power.[37] These equitable considerations likewise drove the refusal to institute a

32. THE FEDERALIST NO. 69 (Alexander Hamilton) (describing the pardon power as "resembl[ing] equally that of the king of Great Britain and of the governor of New York").

33. 3 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 696–97, 703–04 (1906).

34. *See* N.Y. CONST. of 1777, art. XVIII, § 18 ("[The governor shall be given the power] to grant reprieves and pardons to persons convicted of crimes, other than treason or murder, in which he may suspend the execution of the sentence, until it shall be reported to the legislature at their subsequent meeting; and they shall either pardon or direct the execution of the criminal, or grant a further reprieve.").

35. N.Y. CONST. of 1821, art. III, § 5; N.Y. CONST. of 1846, art. IV, § 5; N.Y. CONST. of 1894 art. IV, § 5; N.Y. CONST. of 1939 art. IV, § 4; Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293, 319 n.123 (2013) ("At various times, several proposals to amend the pardon power largely concerned with procedures surrounding pardons for murder were under consideration but none were enacted.").

36. 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 135–36 (1906).

37. Caplow, *supra* note 35, at 319.

requirement that the governor issue explanations of pardons granted.[38]

The 1894 Constitutional Convention involved more robust proposals to amend the pardon process and organization by including a judicially styled pardon board that would include judges sitting along with the governor.[39] However, yet again, the exclusive executive pardon power escaped these efforts unscathed. The 1967 Constitutional Convention, latest in New York state history, yielded a voter guide explaining the pardon process and the essence of the debate over proposed changes:

> Those in favor of the retention of the Governor's present authority argue that this power is necessary to serve as a check on "mechanical jurisprudence" that might work harsh results in an individual case. They further argue that the Governor has exercised the power fairly, that the system works well and, as a result, this traditional power of the Governor should be retained. Those opposed to the retention of his power argue that it is unnecessary since parole and certification of good conduct from parole boards accomplish the same ends. They further argue that the power could be abused, and that it would be better to put the pardoning power in the parole boards which are more familiar with individual cases than is the Governor.[40]

Aside from a removal of an original reference to treason, the 1967 convention produced a contemporary gubernatorial pardon power largely tracking the power as it was established in post-Revolutionary New York.[41]

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38. 2 N.Y. STATE CONSTITUTIONAL CONVENTION COMMITTEE: PROBLEMS RELATING TO EXECUTIVE ADMINISTRATION AND POWERS 51 (1938) ("[T]he pardoning power was based on mercy, not on justice: justice can always assign reasons, but mercy cannot.").

39. 3 LINCOLN, *supra* note 33, at 310.

40. N.Y.S. TEMPORARY COMMISSION ON THE CONSTITUTIONAL CONVENTION 119 (1967).

41. N.Y. CONST. art. IV, § 4 ("The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, the governor shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. The governor shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which the convict was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve."); *see also* N.Y. EXEC. LAW § 15 (McKinney 2023) ("The governor has power to

The Texas governor's pardon power is enshrined both constitutionally and statutorily.[42] However, unlike California and New York, and in a fashion more similar to Florida, that power is predicated on recommendations made by the Texas Board of Pardons and Paroles.[43] The Board in turn is charged with researching and collecting information needed to support recommendations made to the governor, upon which the governor makes his or her ultimate decision.[44] *Ex parte Ferdin* involved a defendant convicted of night-time burglary and sentenced to two years.[45] The governor granted Ferdin a conditional pardon based on recommendations made by the Board.[46] The governor later

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grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations provided in this article."); Caplow, *supra* note 35, at 320 (footnote omitted) ("The separate reference to treason, a grave concern at the founding of the country, was eliminated at the last Constitutional Convention."); *id.* at 320 n.128 (citing JACK B. WEINSTEIN, A NEW YORK CONSTITUTION MEETING TODAY'S NEEDS AND TOMORROW'S CHALLENGES 93 (1967)) ("Apparently, the proviso against pardons for treason was superfluous since there had never been any convictions for treason in almost 200 years.").

42. TEX. CONST. art. IV, § 11(b) ("In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction or successful completion of a term of deferred adjudication community supervision, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishments and pardons; and under such rules as the legislature may proscribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke conditional pardons. With the advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason."); TEX. CODE CRIM. PROC. ANN. art. 48.01.

43. TEX. CODE CRIM. PROC. ANN. art. 48.01.

44. *See* TEX. CONST. art. IV, § 11(b); TEX. CODE CRIM. PROC. ANN. art. 48.01; *Ex parte* Ferdin, 183 S.W.2d 466, 467 (Tex. Crim. App. 1944); James C. Harrington, *Does Real Innocence Count in Review of Capital Convictions?*, 1 TEX. F. ON C.L. & C.R. 38, 38 (1994).

45. 183 S.W.2d at 466.

46. *Id.* The court noted the following language in the proclamation signed by the Governor:

> If, however, he is guilty at any time of any misconduct or violation of the law or fails to comply in any way with the terms hereof, or for any other reason the Governor may deem sufficient (including any facts not known to the Governor at the time of this clemency) this conditional pardon shall be and is subject to revocation at the Governor's discretion, with or without hearing, as the Governor may determine, and, upon revocation by the Governor of this conditional pardon, same shall become and be null and void and of no force and effect; and the said Bennie Ferdin shall be, by order of the Governor, returned to and confined in the penitentiary to serve the sentence originally imposed upon him or so much thereof as had not been served by the said Bennie Ferdin at the time of his release under the terms of this or any previous clemency.

Id. at 467.

revoked the conditional pardon and required that Ferdin return to prison.[47] Ferdin's main contention on appeal was "that the Board of Pardons and Paroles, in advising the Governor to revoke the parole given appellant, was 'high Handed, vicious, unwarranted and without authority of law.'"[48] The court rejected Ferdin's contention that the Board was acting more as a judicial body in contravention of state law, finding that the Board was assisting the governor in the exercise of his constitutional and statutory prerogative.[49]

Once the Board has made its recommendations to the governor, he or she can accept or reject the Board's recommendation for pardons, or grant something less than that recommended by the Board.[50] In tribute to its American revolutionary roots, the Texas gubernatorial pardon power does not extend to treason or impeachment.[51] The pardon power also does not extend to civil matters.[52] Within the aforementioned parameters, the governor maintains ultimate parole authority.[53] It should also be noted that the state legislature does not possess authority regarding specific pardon decisions made by the governor, but is constitutionally granted broader policy powers within which the governor is able to exercise his or her powers.[54]

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47. *Id.*

48. *Id.*

49. *Id.* ("The power and duties assigned to the Board and parole officers in said Sections do not constitute judicial authority and power. They are limited to the purpose of gathering information and making recommendations for the use and benefit of the Governor in the performance of his duty to enforce penalties. Neither the Board nor parole officers have power to make a judgment or decree that will be binding on the Governor. They are merely arms of the executive designed to assist him in a wiser performance of his duty.").

50. Harrington, *supra* note 44, at 38. It is impermissible for the governor to grant greater clemency than the Board recommends. *Id.* at 38–39. The only other authority granted the governor in the matter of clemency is the ability to give a one-time, thirty-day stay of execution. *Id.* at 39.

51. TEX. CONST. art. IV, § 11(b).

52. *See generally Ex parte* Green, 295 S.W. 910 (Tex. 1927) (recognizing the limitation of the governor's pardon power to criminal sanction but not extending to civil matters).

53. TEX. CONST. art. IV, § 11(b); *Ex parte Ferdin*, 183 S.W.2d at 468 ("The Governor acted and he had the power to do so."); *Ex parte* Black, 59 S.W.2d 828, 829 (Tex. Crim. App. 1933) (discussing the governor's pardon of the prisoner due to health considerations).

54. *See Ex parte* Nelson, 209 S.W. 148, 150 (Tex. Crim. App. 1919) (addressing the governor's authority regarding executive clemency and limits to legislative involvement) ("It is not within the power of the Legislature to enlarge or restrict the pardoning power vested in the executive, nor to impose conditions upon which it may be exercised, nor requirements touching the conditions precedent or subsequent which are to be imposed by the executive upon the convict. . . .").

III. BUT DOES THE GOVERNOR'S PARDON POWER EXTEND TO CORPORATIONS?

The foregoing does not directly address the question of whether the gubernatorial pardon power extends to corporations and other juridical entities. Perhaps a proper starting point for that analysis is an examination of corporate criminal liability that would necessitate and justify the exercise of the governor's pardon power.

Early English law treated corporations as mere instrumentalities and thus incapable of criminal capacity.[55] This proposition is generally accepted as being established by Pope Innocent IV and later embellished by Baron Edward Thurlow.[56] Accordingly, early English courts established this lack of corporate criminal culpability as matter of common law.[57] Perhaps Chief Justice Holt's 1701 pronouncement that "a corporation is not indictable, but the particular members of it are" provided the clearest precedential statement of the time.[58]

The next century brought with it a change in judicial attitudes towards corporate criminal culpability.[59] Perhaps a function of industrialization and a concomitant proliferation of corporation, English courts began finding corporations responsible for crimes of omission,[60] crimes of commission,[61] and criminal nuisance.[62] A primary basis for this philosophical metamorphosis was the adaptation of tort based vicarious liability as a nexus between human actors and the corporate principals on whose behalf those humans were acting.[63] Strict liability was used to justify imposition of corporate liability even in seemingly minor offenses.[64] The twentieth century brought about further philosophical progression with the advent of the

55. Vincent Todarello, *Corporations Don't Kill People – People Do: Exploring the Goals of the United Kingdom's Corporate Homicide Bill*, 22 N.Y.L. SCH. J. INT'L & COMPAR. L. 481, 486 (2003) (citing Stanley S. Arkin, *Corporate Guilty Plea*, N.Y.L.J., Oct. 10, 1985, at 28).

56. *Id.* at 486–87 (citing Stanley S. Arkin, *Corporate Guilty Plea*, N.Y.L.J., Oct. 10, 1985, at 28).

57. *Id.* at 487 (citing *In re* Sutton's Hospital, 77 Eng. Rep. 937, 973 (K.B. 1612)).

58. *Id.* (citing Anonymous, 88 Engl. Rep. 1518, 1518 (K.B. 1701)).

59. *Id.*

60. *Id.* (citing Birmingham & Gloucester Ry. Co., 3 Q.B. 223, 233 (1842)).

61. *Id.* (citing Queen v. Great N. of Eng. Ry. Co., 9 Q.B. 315, 326 (1846)).

62. *Id.* (citing Queen v. Stephens, 1 L.R. 702 (Q.B. 1866)).

63. *Id.* (citing Queen v. Stephens, 1 L.R. 702 (Q.B. 1866)).

64. *Id.* at 488 (footnote omitted).

"directing mind" theory.[65] In explaining the rationale supporting the "directing mind" theory, Lord Denning stated:

> A company may in many ways be likened to a human body. They have a brain and a nerve [center] which controls what they do. They also have hands which hold the tools and act in accordance with directions from the [center]. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. . . .[66]

From that point forward, English law has generally stabilized around the notion that corporations and humans would be measured by comparable culpability standards.[67] What followed was a newly and firmly entrenched tradition of holding corporations responsible for several intent-based crimes, including conspiracy to defraud,[68] aiding and abetting regulatory offenses,[69] and contempt of court.[70]

U.S. law evolved over a similar trajectory, from viewing corporations as incapable of criminality to being far more open to holding these juridical persons responsible for culpable behavior. In *People v. Rochester Railway & Light Company*, the New York Court of Appeals interpreted New York's homicide statute as inapplicable to corporations.[71] The corporation had been indicted of second degree manslaughter, having "installed certain apparatus in a residence in Rochester in such a grossly improper, unskillful, and negligent manner that gases escaped and caused the death of an inmate."[72] The court, reading the state homicide statute then in place, held that "homicide" was "the killing of one

65. *Id.*

66. *Id.* (quoting H.L. Bolton Co. v. T.J. Graham & Sons, 3 All E.R. 624, 630 (C.A. 1956)).

67. *Id.* at 489.

68. *Id.* (citing I.C.R. Haulage, 1 All E.R. 691, 692 (Crim. App. 1944)).

69. *Id.* (citing Ackroyds Air Travel, Ltd. v. D.P.P., 1 All E.R. 933, 933 (1950); John Henshall (Quarries) Ltd. v. Harvey, 2 Q.B. 233, 236 (1965)).

70. *Id.* (citing R. v. Odham's Press, 3 W.L.R. 796 (1956)).

71. 88 N.E. 22, 24 (N.Y. 1909).

72. *Id.* at 22.

human being by another human being."[73] The court further found no intent by the New York legislature "to abandon the limitation of its enactments to human beings or to include a corporation as a criminal."[74] In doing so, the court distinguished other instances in which corporations have been included in the meaning of the term "person."[75] Perhaps this framing was a harbinger of changes yet to come.

The *Rochester Railway* court distinguished the approach applied by a New York federal court just a few years earlier in *United States v. Van Schaick*[76] and contemporaneously applied by the U.S. Supreme Court in *New York Central & Hudson River Railroad Company v. United States*.[77] *Van Schaick* involved the tragic deaths of nine hundred people aboard the steamboat "General Slocum" ("Slocum") in the aftermath of a fire that erupted onboard the ship.[78] The Knickerbocker Steamboat Company, Slocum's corporate owner, was indicted along with its president, captain, and other key employees for causing the deaths while violating a federal maritime safety statute.[79] The Court considered the core issue of whether the Knickerbocker

73. *Id.* at 24; *see also* N.Y. PENAL LAW § 179 (1908).
74. *Rochester Railway*, 88 N.E. at 24.
75. *Id.* at 23.
76. 134 F. 592, 602 (C.C.S.D.N.Y. 1904).
77. 212 U.S. 481, 493–94 (1909).
78. *Van Schaick*, 134 F. at 594.
79. *Id.* ("[S]ection 5344 of title 70 of the Revised Statutes [page 3629, U.S. Comp. St. 1901] . . . provides: ' . . . Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.'"); *id.* ("The indictments charge that the deaths were caused (1) by unsafe and unserviceable life preservers (indictment No. 1 and indictment No. 2, count 1; indictment No. 3, counts 1 and 2); (2) by unsuitable, inefficient, and useless life preservers, and incomplete and unfit equipment of steam pumps and hand pumps, so far as the weakness and unserviceability of the hose was concerned, and in that the hose was not provided for and attached to the steam pumps and hand pumps (indictment No. 2, count 2); (3) by the wrongful neglect of Van Schaick, the captain, to discipline and train his crew, whereby none of the crew knew or attended to his duty, and no attempt was made to unlash and swing out the lifeboats or the life rafts, in consequence of which the passengers were obliged to throw themselves into the water, and thereupon drowned on account of the useless and unfit life preservers. Three classes of persons are charged with breach of duty in regard either to the defective appliances or the discipline of the crew, or both, to wit, the owner of the vessel, the Knickerbocker Steamboat Company, Van Schaick, the master of the vessel, Barnaby, Atkinson, Dexter, and Pease.").

Steamboat Company, the corporation that owned Slocum, should be held responsible for manslaughter. The Court promptly rejected the arguments against corporate liability based on penalty of a ten-year prison term imposed by the statute[80] and declined to excuse defendants purely based on their corporate status.[81] The Court held that "[a] corporation can be guilty of causing death by its wrongful act."[82] The Court also noted that intent to kill was not a statutory prerequisite.[83]

New York Central represented an even greater seminal shift in U.S. corporate criminal law.[84] The corporation argued that imputation of managers' acts to the corporation was an impermissible violation of the corporation's due process of law.[85] However, the Court analogized the case at bar to the well-established tort-based principle of respondeat superior.[86] This

80. *Id.* at 602 ("But it is said that no punishment can follow conviction. This is an oversight in the statute. Is it to be concluded, simply because the given punishment cannot be enforced, that Congress intended to allow corporate carriers by sea to kill their passengers through misconduct that would be a punishable offense if done by a natural person? A corporation can be guilty of causing death by its wrongful act. It can with equal propriety be punished in a civil or criminal action. It seems a more reasonable alternative that Congress inadvertently omitted to provide a suitable punishment for the offense, when committed by a corporation, than that it intended to give the owner impunity simply because it happened to be a corporation.").

81. *Id.*

82. *Id.* The court further explained that the reason the corporation could be held criminally responsible was because "[t]he corporation navigated without [life preservers], and caused death thereby." *Id.*

83. *Id.*

84. 212 U.S. 481, 496 (1909); *id.* at 491–92 (quoting Elkins Act, Pub. L. No. 57-103, Chap. 708, 32 Stat. 847, 847–48 (1903)) ("That act, among other things, provides: '(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed. . . . 'In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.'").

85. *Id.* at 492 ("It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged.").

86. *Id.* at 493 (citing Lake Shore & M. S. R. Co. v. Prentice, 147 U.S. 101, 109 (1893)) ("It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment."). For deeper analysis of contemporary respondeat superior doctrine, see Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure*

was the first instance in which the Court[87] rationalized its extension of corporate criminal culpability by focusing on the critical importance of corporations to the national economy,[88] the corporation's ability to commit the crime at issue,[89] and the public-policy considerations supporting the imposition of corporate criminal culpability.[90] Even as it was enlarging corporate criminal culpability, the Court conceded that there are some crimes which by their nature corporations cannot commit. [91]

Since the *Van Schaick* and *New York Central* decisions, state courts throughout the United States have continued to struggle with the concept of criminal culpability. However, greater clarity from state legislatures catalyzed a steady matriculation towards greater coverage. Contemporary legislatures began addressing corporate criminal liability for homicide by amending the definition provisions in state penal codes to include corporations within the basic definition of a "person" and to delete specific

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on Corporate Defendants, 44 AM. CRIM. L. REV. 53, 64–65 (2007). The *New York Central* decision has been subject of vociferous debate. *See, e.g.*, John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1329, 1338, 1358 (2009) (decrying corporate criminal culpability as violative of "all three of the necessary conditions for criminal responsibility" and "inconsistent with the fundamental principles of a liberal society"); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 824 (1996) ("The *respondeat superior* theory was the only approach available in *New York Central* to preserve corporate criminal liability in the face of the due process challenge without completely foreclosing other constitutional protections to corporate defendants.").

87. *New York Central*, 212 U.S. at 493 (citing Lothrop v. Adams, 133 Mass. 471 (1882)).

88. *See id.* at 495–96 ("[T]he great majority of business transactions in modern times are conducted through these bodies, and . . . interstate commerce is almost entirely in their hands. . . .").

89. *See id.* at 494–95 (citing 2 VICTOR MORAWETZ, THE LAW OF PRIVATE CORPORATIONS § 733 (1886); SEWARD BRICE, A TREATISE ON THE DOCTRINE OF ULTRA VIRES 366 (Ashbel Green ed., Baker, Voorhis, & Co. Publishers 1875) (1874)) ("It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.").

90. *See id.* (warning that if corporate criminal liability were impossible, "many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy").

91. *Id.* at 494; *see also* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 841 (1927) (arguing in 1927 that there was no legal bar that "preclude[d] the commission of some crimes, like murder, . . . by corporations").

references to "human beings" as the culpable parties with respect to certain crimes.[92]

State courts responded to this legislative guidance by recognizing this greater clarity and intent to include corporations in the universe of persons covered by a more full panoply of recognized criminal activity.[93] These courts appeared to have willingly accepted the philosophical shift in policy that incorporated homicide into the corporate criminal liability spectrum.[94] *Vaughn & Sons, Inc. v. State* involved the prosecution of a corporation, "acting through two of its agents, [for causing] the death of two individuals in a motor vehicle collision."[95] The Court of Criminal Appeals of Texas held that the corporate defendant was eligible to be prosecuted for criminally negligent homicide under the Texas Penal Code.[96] The court recognized the evolution that the sphere of corporate criminal culpability was experiencing and the emerging consensus as one that would hold a corporation "liable for specific intent crimes and offenses of criminal negligence."[97] These legislative and judicial developments facilitated greater prosecutorial inclination to pursue criminal charges against corporations.[98] The trend favoring corporate criminal prosecutions now appears to be

92. Kathleen F. Brickey, *Death in the Workplace: Corporate Liability for Criminal Homicide*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753, 758 (1987).

93. *See, e.g.*, People v. Ebasco Servs., 354 N.Y.S.2d 807, 811 (N.Y. Sup. Ct. 1974) (holding that after the inclusion of a corporation within the Penal Code's definition of personhood, "a corporation cannot be the victim of a homicide, [but] it may commit that offense and be held to answer therefor"); Vaughan & Sons, Inc. v. State, 737 S.W.2d 805, 810 (Tex. Crim. App. 1987) (en banc) ("The Legislature, recognizing that for years Texas was the only jurisdiction in which corporations bore no general criminal responsibility, and aware of the previous roadblocks in case law to the prosecution of corporations for criminal offenses, enacted statutes to remedy the situation.").

94. *See* Granite Constr. Co. v. Superior Ct., 197 Cal. Rptr. 3, 9 (Ct. App. 1983) (describing the Ebasco Services and Fortner LP Gas courts' expansion of liability to homicide as resting upon "a much weaker [statutory] definition" due to the presence of "when appropriate" language).

95. 737 S.W.2d 805, 805 (1987).

96. *Id.* at 814.

97. *Id.* at 812.

98. *See, e.g.*, Michael B. Bixby, *Workplace Homicide: Trends, Issues, and Policy*, 70 OR. L. REV. 333, 335–56 (1991) (surveying numerous state prosecutions in which corporations have faced criminal charges stemming from employee deaths); Donald Janson, *Great Adventure Owners Cleared of Criminal Charges in Fatal Fire*, N.Y. TIMES, July 21, 1985, at 1 (reporting the manslaughter trial of the Six Flags Corporation after eight New Jersey teenagers died in an amusement park fire); *see also* David J. Reilly, Comment, *Murder, Inc.: The Criminal Liability of Corporations for Homicid*e, 18 SETON HALL L. REV. 378, 393–94 (1988) (describing the Six Flags prosecution history).

determined and certain for the foreseeable future.[99] However, this corporate criminal culpability doctrine is not unfettered and is still subject to the parameters of judicial review.[100]

Despite the rich development and evolution in the sphere of corporate criminal culpability, there has been a dearth of similar developments in the area of corporate pardons. However, such corporate pardons are not completely unprecedented. In the federal context, the U.S. Justice Department has opined that corporations can be considered for pardons from convictions.[101] For example, Emprise Corporation, a Buffalo-based sports and concessions conglomerate, was convicted of participating in a conspiracy to use interstate facilities to acquire a Las Vegas casino in violation of Nevada law.[102] Emprise subsequently

99. *See* Granite Constr. Co. v. Superior Ct., 197 Cal. Rptr. 3, 4 (Ct. App. 1983) (permitting the indictment of a corporation for manslaughter under California law); State v. Lehigh Valley R.R. Co., 103 A. 685, 687 (N.J. 1917) (upholding the indictment of a corporation for involuntary manslaughter under New Jersey law); People v. Ebasco Servs., 354 N.Y.S.2d 807, 811–12 (Sup. Ct. 1974) (permitting, as a matter of New York law, the indictment of a corporation for criminally negligent homicide but dismissing the indictment in the case on other grounds); Vaughan & Sons, Inc. v. State, 737 S.W.2d 805, 814 (Tex. Crim. App. 1987) (en banc) (affirming the conviction of a corporation for criminally negligent homicide under Texas law); Randall Chase, *Refinery Fined in Deadly Blast*, PHILA. INQUIRER, July 9, 2003, at B03 (reporting that a corporation pled no contest to charges of criminally negligent homicide under Delaware law); for updated federal policy on prosecuting juridical persons, see U.S. DEP'T OF JUST., JUST. MANUAL, § 9-28.200(A) (2023) ("*Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment.* Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Holding corporations accountable for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes." (emphasis added)).

100. *See, e.g.*, People v. Warner-Lambert Co., 414 N.E.2d 660, 665–66 (N.Y. 1980) (dismissing an indictment of a corporation in the wake of a factory explosion that killed six employees for lack of sufficient proof that the explosion was foreseeable by the defendant).

101. MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY & PRACTICE § 2:79 (3d ed. 2018–19)*; see also* Anthony Marro, *Emprise Corp. Loses Plea for U.S. Pardon*, N.Y. TIMES, Sept. 29, 1977, at A1 ("After concluding that Emprise was eligible, however, the Justice Department lawyers also concluded that it was not deserving of one, and recommended that it be rejected."). Further, U.S. presidents have been "remitting corporate fines since the nineteenth century." MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW POLICY & PRACTICE § 2:79 n.15.

102. Tony Kornheiser, *Federal Pardon Sought by Emprise Corporation*, N.Y. TIMES, Sept. 14, 1976, at 47 ("Emprise, a Buffalo-based company that has been identified with Sportservice, Sportsystem and Ramcorp Metal in recent years, was convicted and fined $10,000 in 1972 for its part in the hidden ownership of the Frontier Hotel in Las Vegas. As a defendant in that case—United States vs. Polizzi et al—Emprise was tied to several

sought a pardon from President Carter to aid in addressing licensing issues the company was experiencing in several states as a result of its conviction.[103] In assessing the Emprise petition, "Justice Department lawyers did considerable research before concluding that a corporation, like an individual, was eligible for a pardon if the President saw fit to grant it."[104] However, the Justice Department recommended against the granting of the pardon and correspondingly denied the pardon on its merits.[105] Contemporary chief executives have certainly proven themselves unrestrained by historical norms and willing to consider nontraditional maneuvers.[106]

While research has not revealed an express extension of the gubernatorial pardon to corporations in most states, there is at least one example of this power being used in the corporate context.[107] Similarly, Florida Statute section 561.15 articulates

persons identified by Government officials as high-ranking members of organized crime, including three defendants, Michael Polizzi, Anthony Giordano and Anthony Joseph Zerilli, who were convicted in the case."); *see also* Polizzi v. U.S., 550 F.2d 1133, 1135 (9th Cir. 1976).

103. Kornheiser, *supra* note 102 at 47 ("In a rare move, Emprise Corporation has applied for pardon from the Federal felony conviction it received in 1972. Emprise, the family-owned sports and concessions conglomerate, reportedly earns $600 million annually through its various holdings in the United States, Canada, Puerto Rico and England. If it is granted the pardon, Emprise would have a significant legal lever in maintaining its sports and concession licenses. And it might be successful in overturning previous denials of licenses that have been based on the conviction.").

104. Anthony Marro, *Emprise Corp. Loses Plea for U.S. Pardon*, N.Y. TIMES, Sept. 29, 1977, at B11.

105. *Id.* ("After concluding that Emprise was eligible, however, the Justice Department lawyers also concluded that it was not deserving of one, and recommended that it be rejected. This recommendation was endorsed by Peter F. Flaherty, the Deputy Attorney General, who sent the request to the White House about two weeks ago with his own recommendation that it be denied. . . . One Justice Department official said that their chief objection was a feeling that the reorganization of the sports conglomerate was 'more like a chameleon than a real change.'") It should be noted that, while not expressly framed as pardons, presidents have remitted corporate fines since the late 1800s. *See, e.g.*, Remission of Fine for Violating The Sherman Anti-Trust Act: Stomps-Burkhardt Company, PUB. PAPERS (Sept. 16, 1930); Remission of Sentence for Failure to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service: Chesapeake & Ohio Railroad Company of Indiana, PUB. PAPERS (June 19, 1923); Remission of Fine for Violation of Freight Regulations of Interstate Commerce Commission: St. Louis and Hannibal Railway Company, PUB. PAPERS (Mar. 13, 1920); Remission of Fine for Violation of River Harbor Act: Union Bridge Company, PUB. PAPERS (Feb. 21, 1908); Partial Remission of Fine for Failure to Pay Liquor Excise Tax: Hannis Distilling Company of Philadelphia and Baltimore, PUB. PAPERS (Jan. 15, 1875).

106. Reuters Staff, *Trump Has Discussed Pardoning Himself, Source Says*, REUTERS (Jan. 7, 2021, 4:01 PM), https://www.reuters.com/article/us-usa-trump-pardons/trump-has-discussed-pardoning-himself-source-says-idUSKBN29C2Y6.

107. Ashby, *Pardons Received in Whitewater (No, Not That Whitewater)*, WALL ST. J. (Jan. 26, 2007, 9:29 AM), https://www.wsj.com/articles/BL-LB-3184 ("We don't have the

that the receipt of a pardon is a prerequisite to the restoration of corporate rights and privileges.[108] It would not be hard to imagine a Governor Musk being willing to break tradition.

A similar justification that might hold at least persuasive precedential value, particularly in the gubernatorial context, is the posthumous pardon. At one point, posthumous pardons were considered taboo because the convicted person no longer had capacity to accept the pardon.[109] However, contemporary examples in each of the sampled states show that trends substantially shifted in favor of posthumous pardons.

In Texas, the posthumous pardon prohibition was directly challenged in the matter of Timothy Cole, a former Texas Tech student who died while serving a twenty-five year sentence after being convicted of raping fellow student Michelle Mallin.[110] In 2010, Texas State Senator Rodney Ellis asked then-Attorney General (and now Governor) Greg Abbott to opine as to whether then-Governor Rick Perry possessed posthumous pardon

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numbers in front of us, but we can't remember the last time an outgoing governor pardoned a company. It happened last month. Outgoing Alaska governor Frank Murkowski on Nov. 30, just days before he was slated to leave office, pardoned the Bellingham, Wash.,-based Whitewater Engineering and its CEO, Thom Fischer, on charges of negligent homicide and manslaughter – for the April 1999 death of a worker – Gary Stone.").

108. FLA. STAT. § 561.15(4) (2022) ("If any corporation has received a full pardon or restoration of civil rights pursuant to state law with respect to any conviction of a violation of law, the conviction does not constitute an absolute bar to the issuance, renewal, or transfer of a license or grounds for revocation or suspension of a license.").

109. Opinion No. C-471, Tex. Att'y Gen. Op. 1, 1 (1965) (quoting Hunnicutt v. State, 18 Tex. Ct. App. 498, 520 (1885)) ("'1st. A pardon, in order to be complete, must, in contemplation of law, be delivered and accepted.' 2d. 'The principles applicable to the delivery of a pardon and an ordinary deed must be considered analogous, and in either case its delivery is complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee or obligee, and the latter assents to it either by himself or agent;. . . .'"); *see also* United States v. Wilson, 32 U.S. 150, 161 (1833) ("A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance."); Meldrim v. United States, 7 Ct. Cl. 595 (1871); Burdick v. United States, 236 U.S. 79 (1915). *But see* Schick v. Reed, 419 U.S. 256, 261 (1974) ("[T]he requirement of consent was a legal fiction at best."); Biddle v. Perovich, 274 U.S. 480, 486 (1927) (internal citations omitted) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.").

110. *Timothy Cole*, INNOCENCE PROJECT, https://innocenceproject.org/cases/timothy-cole/ (last visited Oct. 10, 2023).

power.[111] General Abbott concluded in the affirmative.[112] General Abbott started with a recitation of the gubernatorial pardon power provided in the Texas Constitution and Code of Criminal Procedure: "[i]n all criminal cases, except treason and impeachment, the Governor shall have power, after conviction[. . .], on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishments and pardons."[113] General Abbott noted the primary restrictions on this gubernatorial power being (1) a required recommendation by the Texas Board of Pardons and Paroles as a prerequisite to the governor's consideration of the pardon request and (2) an inability to pardon treason or impeachment.[114] The governor was otherwise permitted to use the pardon power as he or she deems appropriate so long as all other constitutional requirements are met.[115]

General Abbott focused on a "plain language" reading of the constitution, drawing a presumption that the breadth of the described pardon power was intentional on the part of constitutional drafters, and set forth to "construe its words as they are generally understood, and 'rely heavily on the plain language of the Constitution's literal text.'"[116] General Abbott continued:

> [P]lain language of the Constitution does not expressly address whether the Governor may issue posthumous pardons. However, because the Constitution has given the Governor pardon power in all criminal cases, except treason and impeachment, and has not otherwise limited his authority to grant posthumous pardons, it could be interpreted as

111. Opinion No. GA-0754, Tex. Att'y Gen. Op. 1, 1 (2010).

112. *Id.* at 2.

113. *Id.* at 1 (citing TEX. CONST. art. IV, § 11(b)); *id.* at 1 n.2 (citing TEX. CODE CRIM. PROC. art. 48.01) ("Article 48.01 of the Code of Criminal Procedure mirrors the language in article IV, section 11(b) of the Texas Constitution: 'In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction[. . .], on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons. . . .').

114. *Id.* at 2 (citing TEX. CONST. art. IV, § 11(b)).

115. *Id.* at 2.

116. *Id.* (citing Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 580 (Tex. 2000)); *see also* Garofolo v. Ocwen Loan Servicing, L.L.C., 497 S.W.3d 474, 477 (Tex. 2016) (citation omitted) ("We strive to give constitutional provisions the effect their makers and adopters intended. Accordingly, when interpreting our state constitution, we rely heavily on its literal text and give effect to its plain language.").

> implicitly authorizing him to grant pardons in criminal cases, so long as all constitutional requirements are met.[117]

General Abbott acknowledged the aforementioned contrary opinion.[118] As General Abbott noted, the prior opinion was predicated on the common law principle that the person receiving the pardon had to have the capacity to accept.[119] Thus, the prior opinion rationalized the function of the governor's pardon power by analogizing to the President of the United States, who was deemed not to possess the posthumous pardon power.[120]

General Abbott's analysis also rested on the evolution of federal jurisprudence, and specifically the U.S. Supreme Court's decision in *Schick v. Reed*, which removed the presidential posthumous pardon prohibition.[121] As General Abbott noted, "the United States Supreme Court has since recognized that 'the requirement of consent [to a pardon] was a legal fiction at best' and has generally [been] abandoned."[122] Of particular importance was the timing of the *Schick* decision, decided after opinion C-471. General Abbott concurred with the newly prevailing policy position that "public welfare, not the consent of the grantee" should be the overarching consideration.[123]

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117. Opinion No. GA-0754, Tex. Att'y Gen. Op. 1, 2 (2010).

118. *Id.* (citing Opinion No. C-471, Tex. Att'y Gen. Op. 1, 1 (1965)) ("As you recognize, Attorney General Opinion C-471, issued in 1965, concluded otherwise. Although no Texas cases had addressed the authority of the Governor to grant posthumous pardons, that opinion concluded that because the deceased was unable to accept the pardon, the Governor did not have authority to grant it.").

119. *Id.* (citing United States v. Wilson, 32 U.S. 150, 161 (1833)) ("This acceptance requirement stemmed from early United States Supreme Court common law stating that '[a] pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.'"); *see also* Hunnicutt v. State, 18 Tex. Ct. App. 498 (1885).

120. Opinion No. GA-0754, Tex. Att'y Gen. Op. 1, 2 (2010) (quoting Hunnicutt v. State, 18 Tex. Ct. App. 498, 517 (1885)) ("Texas courts thereafter adopted the acceptance doctrine, recognizing that the power of the Governor, 'under the State Constitution, to pardon offenses, is of the same general nature as that conferred upon the President of the United States.'").

121. 419 U.S. 256, 261 (1974).

122. Opinion No. GA-0754, Tex. Att'y Gen. Op. 1, 2 (2010) (quoting Schick v. Reed, 419 U.S. 256, 261 (1974)).

123. *Id.* (quoting Biddle v. Perovich, 274 U.S. 480, 486 (1927)) (internal citation omitted) ("When granted [a pardon] is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.").

Based on this guidance from General Abbott and following an affirmative recommendation from the Texas Board of Pardon and Paroles, then-Governor Rick Perry granted a posthumous pardon to Mr. Cole.[124] Of particular importance was DNA evidence proving that Mr. Cole was not guilty for the rape which he had been imprisoned for.[125]

Later, in 2019, Florida addressed the matter of posthumous pardons for Charles Greenlee, Walter Irvin, Samuel Shephard, and Ernest Thomas, who were four African-American men accused of raping a seventeen-year-old white girl in 1949 and commonly referred to as the "Groveland Four."[126] The background was unfortunately all too familiar and "symbolic of racial injustice in the state, and in Jim Crow America."[127] Following young Ms. Padgett's complaint to police that she had been raped by four black men, "Greenlee, Irvin, and Shephard were charged, imprisoned, and beaten [the night of their arrest] in the basement of a county jail.[128] Shephard's family home was burned to the ground by an angry mob."[129] Thomas was hunted through the Florida swamps and killed by a deputized mob "in a hail of gunfire as he slept beside a tree before he could answer questions or declare his innocence."[130] Greenlee, Irvin, and Shephard were all convicted—Irvin and Shepherd being sentenced to death while Greenlee was handed a life sentence due to his age.[131]

The U.S. Supreme Court overturned the convictions of Irvin and Shepherd, ordering a retrial of both men.[132] Before the new trial could take place, a Lake County sheriff shot and killed Shepherd, claiming self-defense.[133] Irvin survived the shooting,

124. Brandi Grissom, *TribBlog: Perry Pardons Tim Cole*, TEX. TRIB. (Mar. 1, 2010, 3:00 PM), https://www.texastribune.org/2010/03/01/perry-pardons-tim-cole/ ("'I have been looking forward to the day I could tell Tim Cole's mother that her son's name has been cleared for a crime he did not commit,' Perry said. 'The State of Texas cannot give back the time he spent in prison away from his loved ones, but today I was finally able to tell her we have cleared his name, and hope this brings a measure of peace to his family.'").

125. *Id.* Sadly, it is also noteworthy was that Mr. Cole died never knowing of another man's attempted confession regarding the rape. *Timothy Cole*, *supra* note 110.

126. Ian Stewart, *Accused of Florida Rape 70 Years Ago, 4 Black Men Get Posthumous Pardons*, NPR NEWS (Jan. 11, 2019, 5:45 PM), https://www.npr.org/2019/01/11/684540515/accused-of-florida-rape-70-years-ago-4-black-men-get-posthumous-pardons.

127. *Id.*

128. *Id.*

129. *Id.*

130. S. Con. Res. 920, 2017 Fla. S. Comm. on Rules (Fla. 2017).

131. *Id.* at 2.

132. *Id.* at 3.

133. *Id.*

was again convicted in a second trial, and was again sentenced to death.[134] Florida Governor Claude R. Kirk paroled Irvin in 1968, and Irvin died a year later.[135] Greenlee was paroled in 1960 and lived free but under the shadow of the conviction until his death in 2012.[136]

In 2019, newly inaugurated Governor Ron DeSantis convened and chaired the Florida Board of Executive Clemency to consider the matter of the Groveland Four and the pardon request made on their behalf.[137] The board unanimously recommended posthumous pardons for the men, and Governor Ron DeSantis issued the posthumous pardons, stating, "I believe in the principles of the Constitution. I believe in getting a fair shake. . . . I don't think there's any way that you can look at this case and see justice was carried out."[138]

New York has had its own instance of the gubernatorial posthumous pardon power exercise in 2003 with then-Governor George Pataki posthumously pardoning the late comedian Lenny Bruce.[139] Bruce had been convicted of obscenity charges stemming from an explicit standup performance in a New York City night club.[140] He fought the conviction and the resulting

134. *Id.* at 3–5.

135. *Id.* at 4.

136. *Id.*

137. Sarah Wilson & Jason Kelly, *Groveland Four: Florida Pardons 4 Black Men Accused of 1949 Lake County Rape*, WFTV 9 (Jan. 11, 2019, 9:16 PM), https://www.wftv.com/news/local/clemency-board-hosting-meeting-to-discuss-groveland-four-case/902817860/ ("Seventy years after four black men were accused of raping a teenager in Groveland, the Florida Board of Executive Clemency on Friday unanimously agreed to posthumously pardon the men. The board, which comprises the governor, the attorney general, the agriculture commissioner and the chief financial officer, heard from Norma Padgett, the victim, and members of the accused men's families during Friday's meeting.").

138. Samantha J. Gross, *Florida Pardons Groveland Four: 'This Was a Miscarriage of Justice'*, TAMPA BAY TIMES (Jan. 11, 2019), https://www.tampabay.com/florida-politics/buzz/2019/01/11/florida-pardons-groveland-four-this-was-a-miscarriage-of-justice/ (The alleged rape victim also appeared at the hearing to oppose the pardon petition, maintaining her allegations and imploring the board not to pardon the men. She stated, "I'm begging y'all not to give the pardons because they did it. If you do, you're going to be just like them."); Ian Stewart, *Accused of Florida Rape 70 Years Ago, 4 Black Men Get Posthumous Pardons*, NPR NEWS (Jan. 11, 2019, 5:45 PM), https://www.npr.org/2019/01/11/684540515/accused-of-florida-rape-70-years-ago-4-black-men-get-posthumous-pardons.

139. John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES (Dec. 24, 2003), https://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html.

140. *Obscenity Case Files:* People v. Bruce *(The Lenny Bruce Trial)*, CBLDF, http://cbldf.org/about-us/case-files/obscenity-case-files/people-v-bruce-the-lenny-bruce-

four-month sentence on appeal, but died before final resolution of the matter would be reached.[141] In issuing what is called the first posthumous pardon in New York history, Governor Pataki called it "a declaration of New York's commitment to upholding the First Amendment" as well as "a reminder of the precious freedoms we are fighting to preserve."[142] Relevant literature has made no mention of Bruce's inability to accept the pardon, instead focusing on larger First Amendment considerations.[143] Commentators have also acknowledged more raw political considerations.[144]

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trial/ (last visited Oct. 13, 2023) (New York was not the only, or even the first jurisdiction in which Bruce found himself in legal trouble because of his act. "Beginning in the 1960s, authorities in many of the cities Bruce regularly performed in declared his act obscene. A string of arrests followed. In 1961, he was arrested in San Francisco and charged with violating the California obscenity law (a charge of which he was later acquitted). In 1962, he was arrested twice in Los Angeles and once in Chicago for violating California and Illinois obscenity laws (he beat the LA charges but was convicted in Chicago). In 1963, he was ordered to leave England after British authorities got wind of his performance at a London club. In 1964, California authorities arrested him for a third time for allegedly violating the California obscenity law. Tired of being harassed by the state of California, Bruce took his act to New York City. In March 1964, he booked a run of shows at a Greenwich Village club named the Café Au Go Go. Unfortunately for Bruce, New York City authorities were poised to treat him as unfairly as their West Coast counterparts had.").

141. Ronald K.L. Collins, *Lenny Bruce & the First Amendment: Remarks at Ohio Northern University Law School*, 30 OHIO N. UNIV. L. REV. 15, 26 (2004) (footnote omitted) ("He was convicted by a three-judge court in New York after a trial that spanned six months, involved twelve prosecution witnesses and eighteen defense witnesses, and consumed 2,100 pages of trial transcripts . . . and all this for *misdemeanor* offenses! The New York court sentenced Lenny to four months in the workhouse on Riker's Island. He never served that sentence because he fled New York and died of a morphine overdose sometime later. A remarkable, but little known fact is that Lenny Bruce died a convicted man . . . and the conviction stands to this day."); *see also* Craig S. Lerner, *Posthumous Pardons*, 12 WAKE FOREST L. REV. ONLINE 67, 84–85 (2022) ("Although Bruce was sentenced to four months for obscenity, he died, as the result of a drug overdose, in the pendency of the appeal; and so technically, his conviction was abated."); *id.* at 85 n.161 (citing Durham v. United States, 401 U.S. 481, 482–83 (1971) ("holding that death during the pendency of an appeal 'abates not only the appeal but also all proceedings had in the prosecution from its inception'")).

142. Kifner, *supra* note 139.

143. *See id.*; *see also* Duane Rudolph, *Dignity and the Promise of Conscience*, 71 CLEV. ST. L. REV. 305, 309 n.15 (2023) (citing Sarah Schindler, *Pardoning Dogs*, 21 NEV. L.J. 117, 121 (2020) and her argument for extension of a governor's pardon power beyond natural persons) ("Indeed, there is also important work about the implicit dignity of non-human beings.").

144. Lerner, *supra* note 141, at 119 ("[O]ne might more cynically observe that such proclamations are easy ways for politicians to burnish their own reputations, even if the pardon does nothing to burnish the reputation of the putative beneficiary: Has anyone's opinion of Lenny Bruce changed as the result of the pardon? And, why just Lenny Bruce? Why not Mae West, who actually served ten days in a New York prison for obscenity, but who, alas, has fewer living acolytes to rally to her cause?"). *See generally* Charlotte Burns,

One year after the Groveland Four's posthumous pardons in Florida, California Governor Gavin Newsom granted a posthumous pardon to the African-American civil rights leader Bayard Rustin.[145] As a key advisor to Rev. Martin Luther King Jr., Rustin was a driving force behind the 1963 March on Washington.[146] In 1953, Rustin was arrested in the City of Pasadena on a charge of vagrancy for having sex in a parked car with another man.[147] He consequently spent almost two months in jail.[148] Rustin died of cardiac arrest following an appendix surgery in 1987 with the conviction still on his record.[149] Notably, Rustin's pardon was part of a greater evolution in California law that reflected a sea of change towards homosexuality and the sodomy laws on which Rustin's conviction was based.[150] This is yet another example of how something that would have been considered unimaginable in the annals of history has the potential of being commonplace in the future.

IV. THE POSSIBLE PROBLEM WITH THE CORPORATE PARDON (SELF-DEALING AND THE CORRESPONDING CONSTITUTIONAL SOLUTION)

The governor who pardons a corporation in which he or she has a financial stake could present a particularly complicated set of issues. One such complicated question would be whether the governor is in fact pardoning him or herself. State histories across the country provide very little guidance in this regard.[151]

Sex: The Play That Put Mae West in Prison Returns to New York, THE GUARDIAN (Sept. 29, 2016), https://www.theguardian.com/stage/2016/sep/29/sex-play-mae-west-new-york.

145. Exec. Order N-24-20, Cal. State Libr. (Feb. 4, 2020).

146. *Id.*; Brigit Katz, *Gay Civil Rights Leader Bayard Rustin Posthumously Pardoned in California*, SMITHSONIAN MAG. (Feb. 6, 2020), https://www.smithsonianmag.com/smart-news/bayard-rustin-civil-rights-icon-tarnished-arrest-homosexual-encounter-pardoned-california-180974143/.

147. Katz, *supra* note 146; Exec. Order N-24-20, Cal. State Libr. (Feb. 4, 2020).

148. Phil Willon, *Newsom Grants Posthumous Pardon to Civil Rights Leader Bayard Rustin*, L.A. TIMES (Feb. 5, 2020, 3:00 AM), https://www.latimes.com/california/story/2020-02-05/newsom-bayard-rustin-pardon-lgbtq-people-clemency-discriminatory-laws.

149. Katie Reilly, *California Governor Pardons Civil Rights Leader Bayard Rustin Over Gay Sex Conviction*, TIME (Feb. 5, 2020, 12:36 PM), https://time.com/5778323/bayard-rustin-california-governor-pardon/.

150. Willon, *supra* note 148 ("In the mid-1970s, California repealed the law that criminalized consensual sex between same-sex couples. The state in 1997 also passed a law that for the first time allowed those convicted under such laws to remove their names from lists of registered sex offenders.").

151. Frank O. Bowman, III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 425, 465–67 (2021).

As stated above, a "plain" textual reading of state constitutional texts suggests that the gubernatorial pardon power is broad enough such that he or she could pardon a corporation in which he or she has a financial interest.[152] This position would also have support in a historical context. At the time the U.S. Constitution was framed, state constitutions in place, which were largely considered foundational templates, did not contain self-pardon restrictions.[153] The pardon power of the governor, as with the President, was analogized to and drawn from views on powers as vested in the British King.[154] In fact, self-dealing dangers were considered in the treason context with the decision being made that it was a risk worth taking.[155]

Historical precedence of governors attempting self-pardons, while sparse and presumably flimsy, do nevertheless exist.[156] In 1897, newspaper reports identified a "popular statesman" (without naming the person or even the state in question) as having pardoned himself from a purported horse theft conviction and corresponding three-year sentence.[157] In another instance, a governor's transcribed pardon named himself as the recipient of

152. Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 216 (1999) ("The Supreme Court has stated that the pardon power is plenary, and when interpreting it, one should look to the text to determine its authority.").

153. James M. DeLise, *The Text Where It Happened: Alexander Hamilton, the Federalist Papers, and Presidential Self-Pardons*, 14 N.Y.U. J.L. & LIBERTY 331, 364–65 (2020) ("[E]vidence from state constitutions, the Constitutional Convention of 1787, and *The Federalist Papers* all help to illuminate the scope of the pardon power and the permissibility of self-pardons. At the time of the Constitutional Convention, no state explicitly forbade self-pardons of governors.").

154. Bowman, *supra* note 151, at 434 ("The notion that a chief executive could pardon a person convicted of crime did not, of course, originate with the authors of the American Constitution. Rather, the Framers inherited an English legal tradition of executive clemency rooted, in its ancestral forms, in the idea that the will of the king was the source of law and thus he could release his subjects from its rigors as an act of royal grace.").

155. Nida & Spiro, *supra* note 152, at 218 ("[The] view that self-dealing may be a problem was directly rejected in favor of a stronger presidency with risk of occasional abuse . . . [because] the plain meaning of the text indicates that self-pardoning is permitted.").

156. Max Kutner, *No President Has Pardoned Himself, but Governors and a Drunk Mayor Have*, NEWSWEEK (July 24, 2017, 2:22 PM), https://www.newsweek.com/trump-granting-himself-pardon-governors-641150/; *see also* Saikrishna Bangalore Prakash, *The First (the Only?) Federal Self-Pardon*, WASH. POST (Aug. 3, 2017, 9:00 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/03/the-first-the-only-federal-self-pardon/; Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71 (2019).

157. Kutner, *supra* note 156; *see also* Prakash, *supra* note 156.

the pardon.[158] This presumed clerical error was discovered by a local clerk.[159] In perhaps a more lighthearted example, Governor Orval Faubus of Arkansas was "arrested" and "jailed" for being clean-shaven without a "shaving permit" when he visited a town where the townsmen had grown beards as a municipal celebration.[160] The governor pardoned himself of the charges.[161] Yet another example includes a Tennessean Governor who sent himself to prison as part of a research project to study prison conditions and pardon petitioners, only to conveniently pardon himself of the self-indictment.[162]

A more contentious pardon circumstance involved a clash between Washington Territorial Governor Isaac Ingalls Stevens and the local judiciary. During conflict with local Native American tribes, Stevens decided to evict from the territory Washingtonians who intermarried with tribal women.[163] A power struggle ensued with Stevens declaring martial law in the territory,[164] and Justice Edward Lander nullifying the declaration.[165] Stevens ordered the judge's arrest.[166] However, the

158. *Governor Pardons Himself in Error*, NEWS-PILOT, Nov. 29, 1941, at 10 ("Now, therefore, I, Arthur B. Langlie, governor of the state of Washington . . . do hereby pardon the said Arthur B. Langlie and restore him to all the rights and privileges he forfeited by reason of his conviction and confinement.") (internal quotes omitted).

159. Kutner, *supra* note 156.

160. Bowman, *supra* note 151, at 466 n.175.

161. McGehee, *Faubus 'Jailed': Pardons Himself*, COURIER NEWS, July 14, 1956, at 8 ("Gov. Orval Faubus 'pardoned' himself yesterday after he had been 'arrested' and jailed.").

162. Ben W. Hooper, *Gov. Hooper Tells of Life in Prison*, N.Y. TIMES, Dec. 24, 1911, at 3; *Gov. Hooper in Jail Hears Convict Pleas*, N.Y. TIMES, Dec. 22, 1911, at 4; *One Day Enough for Governor*, THE DAILY GATE CITY, Dec. 22, 1911, at 1.

163. WASH. COURTS, REPORT OF THE COURTS OF WASHINGTON: 2003–2004, at 12 (2004).

164. *See* Cong. Globe, 34th Cong., 1st Sess. 529, 534 (1857) (The declaration of martial law read, in part, "certain evil-disposed persons of Pierce county have given aid and comfort to the enemy . . . they have been placed under arrest, and ordered to be tried by a military commission . . . I, Isaac I. Stevens, . . . hereby proclaim martial law over said county of Pierce.").

165. WASH. COURTS, *supra* note 163, at 12.

166. Roy N. Lokken, *The Martial Law Controversy in Washington Territory, 1856*, 43 PAC. NW. Q. 91 (1952) (providing background on the events leading up to the charges and Governor Stevens' eventual self-pardon); WASH. COURTS, *supra* note 163, at 12 (discussing how, after Lander's arrest, "Judge F. A. Chenoweth reopened the Steilacoom court with 50 armed citizens for protection [and] [t]he angry crowd succeeded in turning back troops sent to arrest Chenoweth"); Sherburne F. Cook Jr., *The Little Napoleon: The Short and Turbulent Career of Isaac I. Stevens,* 14 COLUM. MAG., Winter 2000–01; David Mehl, *The First Historical Precedent for Trump Pardoning Himself Is the Craziest Story Ever*, THE FEDERALIST (Nov. 3, 2017), https://thefederalist.com/2017/11/03/historical-precedent-trump-pardoning-craziest-story-ever/ (providing a detailed account of dialog between Judge Lander, Territorial Chief Justice Chenoweth, and Governor Stevens).

judge escaped these efforts with the assistance of local citizens and the intervention of President Franklin Pierce.[167] The judge held Stevens in contempt and fined him fifty dollars.[168] Although relenting on the major parts of the dispute, Stevens pardoned himself.[169] Despite accounts that the Governor's supporters stood ready to assist him in paying the assessed fine, the pardon seemed to have been allowed to stand.[170]

The foregoing examples do not mean that there would be no checks on the gubernatorial power to pardon a corporation that he or she owns. One should be reminded that a very potent safeguard remains available to the other branches of government that could be used to reign in abuses of the governor's broad pardon power: the power of impeachment.[171] The framers

167. WASH. COURTS, *supra* note 163, at 12.

168. Mehl, *supra* note 166.

169. *Governor Stevens' Famous Pardon of Himself*, 25 WASH. HIST. Q. 229, 230 (1934) ("I Isaac I. Stevens Governor of the said Territory by virtue of the authority vested in me as Governor as aforesaid in order that the President of the United States may be fully advised in the premises and his pleasure known thereon, do hereby, respite the said Isaac I. Stevens defendant from execution of said judgment and all proceedings for the enforcement and collection of said fine and costs until the decision of the President of the United States can be made known thereon.").

170. 2 HAZARD STEVENS, THE LIFE OF ISAAC INGALLS STEVENS, 249–50 (2013) (ebook) ("A fine of fifty dollars for contempt was imposed, which he paid. Anticipating a heavy fine, his friends and admirers were preparing a popular subscription to defray it, but they were not called upon. The judge's action in imposing a merely nominal fine was taken to be an acknowledgment, in accordance with the opinion of nine tenths of the community, that the governor's course, if technically illegal, was necessary and right.").

171. *See* CAL. CONST. art. IV, § 18(a) ("The Assembly has the sole power of impeachment. Impeachments shall be tried by the Senate. A person may not be convicted unless, by rollcall vote entered in the journal, two thirds of the membership of the Senate concurs."); *see also* TEX. CONST. art. 15, §§ 1–3 ("The power of impeachment shall be vested in the House of Representatives. . . . Impeachment of the Governor, Lieutenant Governor, Attorney General, Commissioner of the General Land Office, Comptroller and the Judges of the Supreme Court, Court of Appeals and District Court shall be tried by the Senate. . . . When the Senate is sitting as a Court of Impeachment, the Senators shall be on oath, or affirmation impartially to try the party impeached, and no person shall be convicted without the concurrence of two-thirds of the Senators present."); N.Y. CONST. art. VI, § 24 ("The assembly shall have the power of impeachment by a vote of a majority of all the members elected thereto. The court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the governor or lieutenant-governor, neither the lieutenant-governor nor the temporary president of the senate shall act as a member of the court. No judicial officer shall exercise his or her office after articles of impeachment against him or her shall have been preferred to the senate, until he or she shall have been acquitted. Before the trial of an impeachment, the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal

considered this very issue in the presidential context, finding impeachment a sufficient remedy for abuses of power.[172] In fact, one might find examples in the surveyed states where impeachment was used as a check on alleged gubernatorial abuses of power. Texas Governor James Ferguson was impeached and removed from office in the early 1900s for allegedly selling and otherwise abusing his pardon power.[173] While there appears to have been no governor of New York impeached for the use of his pardon power, Governor Sulzer was impeached for other alleged offenses and removed by the New York Assembly.[174]

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from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state; but the party impeached shall be liable to indictment and punishment according to law."); FLA. CONST. art. III, § 17 ("(a) The governor, lieutenant governor, members of the cabinet, justices of the supreme court, judges of district courts of appeal, judges of circuit courts, and judges of county courts shall be liable to impeachment for misdemeanor in office. The house of representatives by two-thirds vote shall have the power to impeach an officer. The speaker of the house of representatives shall have power at any time to appoint a committee to investigate charges against any officer subject to impeachment. (b) An officer impeached by the house of representatives shall be disqualified from performing any official duties until acquitted by the senate, and, unless impeached, the governor may by appointment fill the office until completion of the trial. (c) All impeachments by the house of representatives shall be tried by the senate. The chief justice of the supreme court, or another justice designated by the chief justice, shall preside at the trial, except in a trial of the chief justice, in which case the governor shall preside. The senate shall determine the time for the trial of any impeachment and may sit for the trial whether the house of representatives be in session or not. The time fixed for trial shall not be more than six months after the impeachment. During an impeachment trial senators shall be upon their oath or affirmation. No officer shall be convicted without the concurrence of two-thirds of the members of the senate present. Judgment of conviction in cases of impeachment shall remove the offender from office and, in the discretion of the senate, may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer.").

172. Bowman, *supra* note 151, at 448–49 (quoting 3 JONATHAN ELLIOT, THE DEBATES IN SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 497, 498 (1827)) ("James Madison did not deny [the possibility of presidential pardon power abuse], but insisted that a president who abused the pardon power in that way could be impeached: 'There is one security in this case [a misuse of the pardon power by the president] to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him.'").

173. Malla Pollack, *The Under Funded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice*, 66 UMKC L. REV. 513, 545 (1998) (citing KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 63 (1989)); *see also* Jaired Stallard, *Abuse of the Pardon Power: A Legal and Economic Perspective*, 1 DEPAUL BUS. & COM. L.J. 103, 132 (2002) (citing Coleen Klasmeir, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1535 n.165 (1995)) ("James Ferguson of Texas was impeached in 1917 for selling pardons.").

174. Matthew L. Lifflander, *The Only New York Governor Ever Impeached*, 85 N.Y. ST. BAR ASS'N J. 11, 13 (2013) ("[A special legislative committee formed to investigate the governor] recommended that the governor be impeached. At a Special Session called by the governor to consider his direct primary bill, the Assembly voted to impeach. The all-

Reconstruction-era Governor Harrison Reed appears to be the only governor impeached in Florida's history, but he survived multiple removal attempts and maintained his seat.[175] Research indicates that no California governors have been impeached.[176] However, the state recall process appears to be just as potent in providing a check on the exercise of gubernatorial executive powers.[177]

V. CONCLUSION

Extension of the gubernatorial pardon power to corporations, while a novel notion, is not unprecedented. The historical evolution of this state executive power, along with the potential civic interest of nontraditional civic players like Elon Musk in holding this executive post, could be just the combination that will give this concept more potent future potential. While an introduction in gubernatorial corporate pardons could carry with it the risk of self-dealing and other political mischief, concomitant constitutional impeachment provisions should provide sufficient

night session was led by Speaker Al Smith in Albany and orchestrated by Mr. Murphy by telephone from his Long Island retreat. The resolution detailed Sulzer's offenses and called for his impeachment 'for willful and corrupt conduct in office and for high crimes and misdemeanors.' The resolution summarized the important charges emanating from the Frawley Committee: the fake campaign finance report Sulzer had signed under oath; his conversion of campaign contributions to 'purchase of securities or other private uses'; his engagement in stock speculation, while as governor he was vigorously pressing for legislation that would affect the business and prices of the New York Stock Exchange; his use of the governor's office to 'suppress the truth' and 'prevent the production of evidence in relation to the investigation' while directing witnesses, including state employees, to act in contempt of the investigating committee; and his 'punish[ing of] legislators who disagreed or differed with him.'").

175. *See* Cortez A. M. Ewing, *Florida Reconstruction Impeachments: 1. Impeachment of Governor Harrison Reed*, 36 FLA. HIST. Q. 299, 299 (1958).

176. *Cf.* Associated Press, *7 US Governors Have Been Impeached and Removed*, SAN DIEGO UNION-TRIB. (Jan. 9, 2009, 6:13 AM), https://www.sandiegouniontribune.com/sdut-impeached-governors-glance-010909-2009jan09-story.html (indicating that only seven U.S. governors have been impeached and removed, and none of those governors were from California).

177. *See* David A. Carrillo et al., *California's Recall Is Not Overpowered*, 62 SANTA CLARA L. REV. 481, 485 (2022); *id.* at 506 n.178 (citing JOSEPH F. ZIMMERMAN, THE RECALL: TRIBUNAL OF THE PEOPLE 60–68 (2d ed. 2013); *Recall History in California (1913 to June 30, 2023)*, CAL. SEC'Y OF STATE, https://www.sos.ca.gov/elections/recalls/recall-history-california-1913-present (last visited Oct. 25, 2023)) (noting that, by comparison of sixteen governors who have been impeached, only five governors have qualified for recall petitions: North Dakota Governor Lynn J. Frazier (1921, succeeded), California Governor Gray Davis (2003, succeeded), Arizona Governor Evan Mecham (1988, impeached prior to the recall election), Wisconsin Governor Scott Walker (2012, defeated), California Governor Gavin Newsom (2021, defeated)).

protections such that the appropriate public policy considerations are properly balanced. It should also enrich the civic discourse as to who we elect to manifest our collective public policy voice.